No. 18-422, No. 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR GOVERNORS ARNOLD SCHWARZENEGGER AND LAWRENCE JOSEPH HOGAN JR. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

DAVID A. SCHWARZ
Counsel of Record
BRUCE A. WESSEL
MICHAEL D. HARBOUR
IRELL & MANELLA LLP
1800 Ave of the Stars,
Suite 900
Los Angeles, CA 90067
(310) 277-1010

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. GERRYMANDERING AMPLIFIES THE VOICES OF PARTISANS AND DROWNS OUT THE VOICES OF MODERATES 3

A. Gerrymandering Results in Legislative Bodies That Are More Extreme Than The Electorate As a Whole 3

B. Partisan Gerrymandering Dilutes the Voting Strength of Moderate Voters 7

II. *JANUS* ADDRESSED COMPARABLE ISSUES 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Abood v. Detroit Bd. of Ed.,
431 U.S. 209 (1977).....11, 13

ERR Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961).....11

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31,
138 S. Ct. 2448 (2018).....*passim*

McCutcheon v. Fed. Election Comm'n,
572 U.S. 185 (2014).....3

Printz v. United States,
521 U.S. 898 (1997).....3

Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary,
134 S. Ct. 1623 (2014).....7

West Virginia Bd. of Ed. v. Barnette,
319 U.S. 624 (1943).....14

Constitutional Provisions

U.S. Const. amend. I.....12

Page(s)

Other Authorities

Arnold Schwarzenegger & Ro Khanna, *Don't listen to the establishment critics. California's open primary works,* Washington Post (June 18, 2018) 9

Christian R. Grose, *Political Reforms in California are Associated with Less Ideologically Extreme State Legislators*, Schwarzenegger Institute Report, March 2016 10

Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines In California*, 53 J.L. & Econ. 545 (2010) 6, 7

David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?* 54 Vill. L. Rev. 57 (2009) 4

Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018) 8, 10

Federalist No. 52 (James Madison) 4

Federalist No. 57 (James Madison) 4

Page(s)

G. Alan Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877 (2006) 5

J. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, The Journal of Politics, Vol. 68, No. 4 (Nov. 2006) 6

Jeff Cummins, *An Empirical Analysis of California Budget Gridlock*, 12(1) State Politics and Policy Quarterly 23 (2012) 9

John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. Miami L. Rev. 489 (2002) 8

Laura Royden, et al., *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice (2018) 5, 10

Maryland Redistricting Reform Commission, 2015 Report, 19 (Nov. 3, 2015) 7

Page(s)

Matthew G. Jarvis, *Redistricting Reform Could Save California from Itself*, California Journal of Politics and Policy Vol. 1 (2009) 5

Nate Silver, *A Statistical Appreciation of the Washington General's And Harlem Globetrotters*, Five Thirty Eight (July 21, 2014) 2

Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839 (2012).....6

Rachel Chason, *Inside Larry Hogan's victory: The numbers behind a GOP win in a blue wave*, Washington Post (Nov. 9, 2019) 8

Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 (2004).....7

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the former California Governor Arnold A. Schwarzenegger and current Maryland Governor Lawrence Joseph Hogan Jr., have governed states that have suffered the consequences of partisan gerrymandering. They have both witnessed how this process leads to hyper-partisanship. While politicians and parties benefit, the public and more centrist voters lose. *Amici* believe that extreme partisan gerrymandering warrants constitutional scrutiny.

Arnold A. Schwarzenegger served as the Governor of California from 2003 to 2011. During his tenure, he successfully advocated for ballot measures that dramatically reformed the election process in California. In 2012, he helped found the Schwarzenegger Institute for State and Global Policy at the Sol Price School of Public Policy, University of Southern California, which is committed to advancing post-partisanship where leaders put people over political parties and work together to find the best ideas and solutions to benefit all.

Larry Joseph Hogan Jr. is the Governor of Maryland currently serving in his second term. As Governor, he continues to advocate for redistricting reform, including the creation of a statutory, nonpartisan redistricting commission. He has also successfully enacted numerous ethical reforms designed to hold government officials to higher standards and keep them more accountable to the public.

---

[1] Rule 37 statement: All parties have consented to the filing of this brief. No party's counsel authored this brief in any part and no person or entity other than *amici* and their counsel funded its preparation or submission.

SUMMARY OF ARGUMENT

Where extreme partisan gerrymandering exists, district lines are drawn in a manner that ensures that all seats remain safe. In such districts, elections are as predictable as a Harlem Globetrotters game. It may be theoretically possible for a party to lose a gerrymandered district, but it is highly unlikely.[2] Politicians whose only competitive election is their party primary are more responsive to that electorate than the electorate as a whole. As a result, legislators often hold far more extreme views than the citizens they ostensibly represent.

This deprives many citizens of any mechanism by which they can influence the policy making process and disenfranchises moderate voters in particular. Despite this, Appellants and others argue that challenges to partisan gerrymanders should be non-justiciable. The Court should reject this argument, as it would effectively give legislators free rein to systematically entrench party extremes and artificially dilute the strength of moderate voters.

Last term in *Janus*, this Court held that public employees could not be compelled to subsidize a union they do not necessarily support. To be sure, as a doctrinal matter, the legal issues presented in *Janus* are different from the ones here. The core constitutional concerns, however, are similar. In *Janus*, the Court

---

[2] The Harlem Globetrotters have beaten the Washington Generals 99.96% of the time. Nate Silver, *A Statistical Appreciation of the Washington Generals And Harlem Globetrotters*, Five Thirty Eight (July 21, 2014), https://53eig.ht/2TiQkVR.

reasoned that a compelled agency fee scheme conflicted with citizens' fundamental right to advocate in favor of laws and policies of their own choosing. If public sector unions want employees' support, they must earn it. The same should be true of politicians. Districts designed to protect one party, however, mean that elections are not competitive, and moderate voices are made all but irrelevant.

For these reasons and the reasons explained below, *amici* respectfully urge this court to hold that the present disputes are justiciable and affirm the judgments below.

ARGUMENT

I. GERRYMANDERING AMPLIFIES THE VOICES OF PARTISANS AND DROWNS OUT THE VOICES OF MODERATES

A. Gerrymandering Results in Legislative Bodies That Are More Extreme Than The Electorate As a Whole

Our constitutional republic was founded on one overarching principle: "government will represent and remain accountable to its own citizens." *See Printz v. United States*, 521 U.S. 898, 920 (1997); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (It is "a central feature of democracy [] that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.") As the framers recognized, "it is particularly essential that the [legislative branch] have immediate dependence on, and an intimate sympathy with, the

people[,]" and "frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." The Federalist No. 52 (James Madison).

But elections can only instill in representatives the "habitual recollection of their dependence on the people," Federalist No. 57 (James Madison), if representatives who fail to cultivate this habit risk defeat. *Amici*, who were both elected to office in statewide elections, know well the importance of being responsive to the demands of voters. As a current and a former Republican governor of majority Democratic states, they each had to appeal to broad swaths of electorate to win elections. This meant building coalitions that included moderate voters in the middle of the political spectrum; voters who are open to considering alternative points of view.

Many legislators, however, at both the state and federal level, rarely face similar pressures to win over voters in general elections as the framers intended. Instead, members of both parties depending on the state have drawn district lines that all but guarantee the election of the candidate of one party in a given district; the primary is the election that matters as the outcome of the general election is preordained. As former speaker of the house Newt Gingrich once remarked, "'[Democrats] get to rip off the public in the states where they control and protect their incumbents, and [Republicans] get to rip off the public in the states [Republicans] control and protect our incumbents, so the public gets ripped off in both circumstances . . . .'" David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 63 (2009).

Partisan gerrymandering, by design, decreases electoral competition in general elections and democratic accountability along with it. For example, prior to the adoption of California's redistricting and primary reforms in 2010, "California's election system produc[ed] winners and losers with relative certainty . . . before 2008, no seat in the California legislature had changed party hands since the last redistricting, and [by 2009], only 3 of 400 elections to the California legislature since 2001 have resulted in a party change." Matthew G. Jarvis, *Redistricting Reform Could Save California from Itself*, California Journal of Politics and Policy Vol. 1, 5 (2009). Congressional races with gerrymandered districts exhibit similar partisan stability. In Maryland, although Republicans have won between 31 percent and 42 percent of the votes in recent congressional elections, the Democratic controlled legislature has drawn maps that "all but guarantee[] Democrats seven out of eight [congressional] districts . . . even during strong Republican years like the wave election of 2014." Laura Royden, et al., *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice 16 (2018).

In gerrymandered districts, representatives stand little risk of losing a general election. Their central objective is to win primaries by catering to their party base. *See, e.g.*, G. Alan Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("[L]egislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system."); Jarvis, *supra*, at 6

("The safe members are relatively free to be as partisan and extremist as they please . . . ."). The result is legislators who are ideologically more extreme than the citizens they are supposed to represent. Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines In California*, 53 J.L. & Econ. 545, 564 (2010) (noting studies demonstrating that "state-level legislators[] tend to take more extreme positions on issues than does the general population").

The empirical evidence bears this out: gerrymandering results in less competitive districts, which in turn leads to less responsive government and polarization. *See, e.g.*, J. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, The Journal of Politics, Vol. 68, No. 4 (Nov. 2006) ("[C]onsiderable evidence support[s] the claim that competitive districts induce greater responsiveness among elected officials."); Grainger, *supra*, at 548 (finding "evidence that legislative behavior changes after each redistricting, and these changes are consistent with the polarization argument. Specifically, drawing districts legislatively . . . is associated with increased polarization in the state legislature."); Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839, 862 (2012) (The empirical evidence "strongly suggest[s] that district maps created by nonpartisan officials will lead to greater responsiveness to voter preferences.").

Amici have witnessed this breakdown in the political process first hand. By experience, *amici* know that gerrymandered legislative bodies look nothing like the deliberative bodies imagined by the founders.

See Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1637 (2014) (partisan gerrymandering reduces the kind of "rational, civic discourse" that is essential "to form a consensus to shape the destiny of the Nation and its people."). Instead of working towards legislative compromise, representatives cater to their base. Indeed, often the only issue on which legislators are willing to cooperate is the gerrymandering process itself (at least where one party has not been able to shut the other out of a meaningful role in the legislative process entirely). Legislators sometimes work together to enact redistricting plans that protect the seats of *both* parties, not just their own. Maryland Redistricting Reform Commission, 2015 Report, 19 (Nov. 3, 2015) ("[L]egislatures that are split by party can still usually agree on one principle: protecting incumbents."); Grainger, *supra*, at 548-49 & n.7 ("[I]n 2001 the district lines [in California] were drawn in a high-profile *bipartisan* gerrymander.") (emphasis added).

B. Partisan Gerrymandering Dilutes the Voting Strength of Moderate Voters

A "perverse consequence" of partisan gerrymandering is that it drives "the center out of [legislatures]." Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004). From the perspective of a partisan mapmaker, predictability of outcomes is the goal. Thus, the mapmaker minimizes the role of moderate or swing voters in election outcomes, voters who are more open to consider alternative viewpoints.

There is no doubt that a law that decreased the weight of the votes of moderate voters from 1 to 0.5 while giving a full vote to those on the left and the right would be unconstitutional. Yet sophisticated gerrymandering technology can effectively accomplish this result. John Hart Ely once warned, "given the capabilities of computers, a green light for partisan gerrymandering can easily undo the good that the Warren Court thought (correctly in a those pre-computer days) its reapportionment decisions would accomplish. Give a latter-day Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance." John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders*? 56 U. Miami L. Rev. 489, 505 (2002).

The result is either one party dominance, or, in the case of bipartisan gerrymanders, highly polarized legislatures and endless gridlock. The experience of *amici* as governors are illustrative.

In Maryland, for example, partisan gerrymandering has led to one party dominance such that the Democrats now enjoy legislative supermajorities. Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018), shorturl.at/hqtDS. In essence, Democrats have been able to gerrymander around Governor Hogan's veto power even though Governor Hogan was recently reelected by double-digit margins. Rachel Chason, *Inside Larry Hogan's victory: The numbers behind a GOP win in a blue wave*, Washington Post (Nov. 9, 2019), https://tinyurl.com/y5mybk6g. The people of

Maryland clearly want the Governor to have a say in the legislative process and act as a check on the legislature even if the partisan Democrats in the legislature do not.

During Governor Schwarzenegger's term, California faced the different but related problem of persistent partisan gridlock. The state "was reeling from the effects of destructive partisanship — stuck with structural deficits" and a perpetual inability to pass timely budgets. Arnold Schwarzenegger & Ro Khanna, *Don't listen to the establishment critics. California's open primary works,* Washington Post (June 18, 2018), https://wapo.st/2NzCBDX. Historically, "California [was] notorious for its budget gridlock" due in large part to extreme partisanship. *See* Jeff Cummins, *An Empirical Analysis of California Budget Gridlock*, 12(1) State Politics and Policy Quarterly 23, 23 (2012) (noting that "[f]rom 1950 to 2008, the budget was adopted late 44% of the time"); *see also id.* at 37 ("[T]he lack of accountability could also signify a larger problem concerning partisan gerrymandering where safe districts serve to insulate legislators from the consequences of gridlock."). The result was not only that the legislature failed to track the views of the public; it was also that nothing could get done, making governing difficult.

In sum, partisan gerrymandering grossly distorts the normal legislative process. This is also why we cannot rely on the normal political process to fix it absent court intervention. As *amici* can attest, state legislatures jealously guard their redistricting powers and can be expected to resist any real reform efforts. For example, even though 73% of Maryland citizens

would prefer maps drawn by an independent commission, the legislature has ignored Governor Hogan's efforts to implement this type of reform. Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018), shorturl.at/hqtDS.

In California, Governor Schwarzenegger and other reformers were only able to enact election reform by circumventing the legislature entirely and appealing directly to the people themselves through the referendum process. These reforms included the creation of an independent redistricting commission and top-two primaries. Unfortunately, California is an exception, and in most states the politicians and the political parties have the ability to ignore the majority of the voters who detest gerrymandering.

California, however, demonstrates that the harms of gerrymandering are real. Following California's reforms, legislative partisanship in California measurably decreased. Christian R. Grose, *Political Reforms in California are Associated with Less Ideologically Extreme State Legislators*, Schwarzenegger Institute Report, March 2016, at 7 ("Legislative voting in California is, on average, less extreme in 2013 and 2014 following the enactment of the top-two primary and redistricting reforms."). "Comparing the extremity measure in 2011 to the extremity measures in 2014, [there was] a 34 percent reduction in ideological extremity in the Assembly pre- and post- reform." *Id.* at 9. In addition, "from early 2011 to late 2014, the average California senator had a decrease in ideological extremity of 31%." *Id.* at 3, *see also* Royden, *supra*, at 4. (finding that "California's commission

drawn congressional map . . . [is] among the most responsive in the country.").

If this Court were to hold that challenges to partisan gerrymanders are non-justiciable, most of this nation's citizens will, like those in Maryland, have no remedy against the constitutional harms outlined above and scourge of unrepresentative legislatures due to gerrymandering. This is not the system our founders envisioned, nor is it one this Court should embrace and endorse.

Extreme gerrymandering prevents government from functioning properly and can deprive citizens of their constitutional right to "influenc[e] the passage . . . of laws." *See ERR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Partisan gerrymandering thus disenfranchises voters twice: first, by facilitating the election of representatives whose views are more extreme and partisan than the population as a whole and second, by potentially creating one-party rule or, alternatively, legislative gridlock.

II. *JANUS* ADDRESSED COMPARABLE ISSUES

This Court has, on occasion, compared public unions to political parties, despite their obvious differences. Such comparisons are relevant here. In *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, this Court held that government employees could not be "forced to subsidize" public sector unions that they "choose not to join." 138 S. Ct. 2448, 2459-60 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)). The concerns that motivated this Court in *Janus* suggest that constitutional challenges

to partisan gerrymanders warrant serious consideration.

The petitioner in *Janus* was Mark Janus, a state employee who did not want to pay an agency fee to the union that a majority of his fellow employees had chosen as their exclusive bargaining agent. This Court held that the First Amendment prohibited the agency fee requirement. In reaching that result, the Court posited a hypothetical about political parties: "Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for . . . the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this." *Janus*, 138 S. Ct. at 2475.

This extreme hypothetical presents an obviously unconstitutional state rule requiring residents to align themselves with a particular political party. Extreme partisan gerrymandering, where a computer systematically discounts the votes of voters who do not adhere to views of the dominant party in their gerrymandered district, is government action that forces moderate voters to be represented in all districts by candidates aligned with the platform of a political party. In effect, extreme partisan gerrymandering is comparable to the very hypothetical that this Court observed in *Janus* is clearly unconstitutional. If Mr. Janus were a Democratic voter in North Carolina, or a Republican voter in Maryland, or moderate voter in either state, he would be harmed by extreme partisan gerrymandering in a comparable way.

To be sure, *Janus* is a very different case involving different legal issues. But it would be a strange

result indeed if public sector unions, who are now required to convince public employees to support them based on the merits, are constitutionally required to be more responsive than elected representatives. *See Abood*, 431 U.S. at 256 ("The ultimate objective of a union in the public sector, like that of a political party, is to influence public decision making in accordance with the views and perceived interests of its membership.") (Powell, J., concurring). In *Janus*, this Court "end[ed] the oddity of allowing public employers to compel union support . . . but not to compel party support. . . ." *Janus*, 138 S. Ct. at 2484. But it would be no less of an oddity if this Court were to hold that compelled agency fees, which affect only a subset of the population and implicate only a narrow set of political issues, warrant constitutional scrutiny, but partisan gerrymandering, which undermines the electoral process on which representative government depends, does not.

The *Rucho* Appellants assert that the Court should hold that the present dispute is non-justiciable and not enter the political fray by intervening in the redistricting process: "[t]he framers delegated this delicate and politically fraught task to Congress for good and sufficient reasons, and this Court should decline the invitation to reassign the authority to itself." *Rucho*, Op. Br. at 36. In *Janus*, this Court rejected a similar argument:

> We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," [cite]—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American

> doctrine of judicial review requires us to enforce the Constitution. . . . ." [t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

Janus, 138 S. Ct. at 2486, n.28. The Court should similarly ignore Appellants' plea not to intervene here.

CONCLUSION

For the reasons set forth above, partisan gerrymandering creates real constitutional harms that require a judicial remedy, and the decisions below should be affirmed.

Respectfully submitted,

DAVID A. SCHWARZ
Counsel of Record
BRUCE A. WESSEL
MICHAEL D. HARBOUR
IRELL & MANELLA LLP
1800 Avenue of the Stars,
Suite 900
Los Angeles, CA 90067
(310) 277-1010

Counsel for Amici Curiae

Dated: March 8, 2019